COURT OF APPEALS
DECISION
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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1617

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

THOMAS R. VOLDEN AND BARBARA VOLDEN,

PLAINTIFFS-APPELLANTS,

V.

OKK CORPORATION AND OKK U.S.A. CORPORATION,

DEFENDANTS-RESPONDENTS,

DYNAMIC MACHINE TOOL AND FEDERATED MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Reversed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 SNYDER, J. Thomas and Barbara Volden appeal from a judgment dismissing their complaint against OKK Corporation and OKK U.S.A. Corporation (collectively, OKK). They challenge each of the trial court's rulings on motions after verdict, particularly as those rulings rest on the trial court's postverdict decision that their expert witness was not qualified to give an opinion on design. We reverse the trial court's rulings and reinstate the jury's verdict in favor of the Voldens.

¶2 Thomas Volden was injured when a tool was expelled through a window on a vertical milling machine designed and manufactured by OKK. The machine, known as the PCV 40-II, was utilized by Volden's employer, Toolcraft Machine, Inc., in a pre-programmed manner to mill or cut steel according to customer specifications. Volden was not the operator of the machine but was walking by the machine when the six-pound tool and tool holder were expelled through the window. The tool hit Volden in the back, breaking his shoulder and tearing his rotator cuff. The Voldens sought to recover damages from OKK alleging that OKK was negligent in the design and manufacture of the machine and that OKK was strictly liable because defects in the machine rendered it unreasonably dangerous.

¶3 The automated milling operation required specialized cutting tools to be grasped by a holder and spindle and then lowered to the work surface on which the steel had been secured. The spindle would then rotate at a high velocity creating the cutting action. In the milling of steel, metal chips are a natural byproduct and must be periodically removed from the machine to prevent a buildup. The steel that Toolcraft was required to use for the job created long, stringy chips that tended to build up around the spindle. The presence of these chips prevented the machine from correctly grasping the required tool in the

automated process. The tool fell onto the work surface and the spindle came down into contact with the tool (rather than the steel piece to be milled). The tool was caught up in the spindle's rotation and the tool and tool holder were hurled against the window at a high velocity. The window broke and the tool was expelled.

¶4 At trial, Volden pointed to the inadequacy of the window to withstand the force of the tool being thrust against it. OKK attempted to show that Toolcraft was neglectful in dealing with the chip buildup problem and that the tool utilized in the machine was somehow to blame for the machine's inability to properly grasp it on that one occasion.

¶5 Volden offered the expert testimony of Eric Waber, who had worked in the field of designing and manufacturing machine components. OKK challenged Waber's qualifications to give opinions on design because he did not hold any professional degrees in the engineering field and he had never designed a machine closely similar to the PCV 40-II.[1] During trial, the trial court ruled that Waber could testify as an expert with any perceived weakness in his qualifications being a matter for the jury to consider in assigning weight and credibility. Waber explained how the machine worked and that Toolcraft was operating the machine within the parameters set by OKK. During his testimony, the jury was shown the remnant pieces of the broken window. Waber opined that it was foreseeable that a tool could be dropped in the automated process and that the spindle could start to descend with no tool in it. He indicated that in any machining operation there can be a "breakage of tools or things can get thrown out of the machine or machine

[1] OKK also objected to Waber giving an opinion that the window should have been made of something else because it lacked a proper foundation. Volden's counsel assured the court that Waber would not give such opinions.

parts can fly around." He explained that because the machine has a rotating spindle, any item lying on the flat work surface and not secured down could be thrown against the machine within a 360° range. It was his opinion that the window was defective in design because it did not "have sufficient guarding to negate this particular item from coming through or … numerous other items, anything that could have come out of this."[2]

¶6 The jury found that: (1) OKK was negligent in designing the PCV 40-II and that such negligence was a cause of Volden's injury; (2) the machine was defective when it left OKK's control and such defective condition rendered the machine unreasonably dangerous and caused Volden's injury; and (3) Toolcraft was negligent in its use of the machine and such negligence was a cause of Volden's injury. Negligence was apportioned 75% to OKK and 25% to Toolcraft.

¶7 OKK moved for judgment notwithstanding the verdict (JNOV) on the grounds that as a matter of public policy, proximate cause could not be found. The trial court granted this motion on public policy grounds. OKK also moved to change the jury's answers on the ground that there was insufficient evidence to support a determination of either negligence or strict liability because Waber was not qualified to render design opinions and those opinions were not supported by legally acceptable bases. The trial court granted this motion as well. OKK sought a new trial based on error in admitting Waber's testimony and in the interest of justice with respect to the apportionment of causal responsibility between OKK and Toolcraft. The trial court conditionally granted those motions. *See* WIS.

[2] The window was interchangeably referred to as a shield or guard.

STAT. § 805.14(4) (1999-2000).[3] Finally, OKK's motion for JNOV on the strict liability claim and its contingent motion for a new trial on the negligence claim were granted.[4] The trial court ruled that any new trial would be on liability only. Judgment was entered dismissing the complaint.

¶8 We first address the trial court's posttrial ruling that Waber lacked sufficient qualifications to give opinion testimony about the design of the machine. This ruling drives the result on the motions after verdict.

¶9 "Whether a witness is qualified as an expert is a discretionary determination for the trial court." ***Tanner v. Shoupe***, 228 Wis. 2d 357, 369, 596 N.W.2d 805 (Ct. App. 1999). We sustain that determination if a demonstrated reasonable basis exists and the decision is made in accordance with accepted legal standards and facts of record. ***Id.*** at 370. An expert may be competent to give opinions when, through training or experience, he or she has sufficient knowledge on how the product works, how it is used, and the dangers of the product. ***Id.*** at 374-75. The expert's testimony may be limited to the field of knowledge.

¶10 Waber established that he had years of experience working with machinery, that he had designed and manufactured components of machines similar to the PCV 40-II, and that he had been involved in the analysis and designing of guarding on machinery. He had formerly been certified as a manufacturing engineer despite the absence of a formal degree in engineering. OKK argues that Waber lacked the requisite qualifications to give an opinion

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[4] The motion for remittitur of damages awarded to Barbara Volden, or in the alternative for a new trial on her damages, was denied.

about design because he had never designed a machine like the PCV 40-II. But Waber had designed similar component parts and had designed machinery guarding.[5] "The law ... does not recognize any gradation of experts based on specialized training or practice. So long as [the witness] qualifies as an expert the weight to be accorded his [or her] testimony is for the [fact finder]." ***Riehl v. De Quaine***, 24 Wis. 2d 23, 32, 127 N.W.2d 788 (1964). The trial court's initial ruling that Waber was a qualified expert based on his experience was in accordance with the general rule in Wisconsin that the weight and credibility of an expert's testimony is for the jury to determine. *See* ***State v. Peters***, 192 Wis. 2d 674, 688, 534 N.W.2d 867 (Ct. App. 1995). The posttrial determination that Waber was not qualified was an erroneous exercise of discretion because it ignored the applicable legal standard of permitting the jury to weigh the testimony.[6]

¶11 It is also important to note that Waber was not giving testimony solely on design. His testimony also explained to the jury the operation of the machine and the expected dangers that should be guarded against. As it turns out, the most significant portion of Waber's testimony was his indication that it was foreseeable that things could be thrown against the interior of the machine in the event of a malfunction in the automated process. That was certainly a matter

[5] OKK cites ***Tanner v. Shoupe***, 228 Wis. 2d 357, 596 N.W.2d 805 (Ct. App. 1999), and ***Black v. General Electric Co.***, 89 Wis. 2d 195, 278 N.W.2d 224 (Ct. App. 1979), as examples where opinion testimony was not allowed on design despite the witness's qualifications to give relevant testimony. In both cases, the witness had never designed anything and was only qualified by repair experience.

[6] A motion for a new trial on the ground of error at trial is addressed to the trial court's discretion. ***Klein v. State Farm Mut. Auto. Ins. Co.***, 19 Wis. 2d 507, 510, 120 N.W.2d 885 (1963). A ruling on such a motion will not be disturbed unless there was an erroneous exercise of discretion. ***Id.*** Having concluded that the trial court erroneously exercised its discretion in its posttrial determination that admission of Waber's testimony was error, the conditional grant of a new trial because of the error is reversed.

within the knowledge of someone with Waber's work experience and qualifications. Given the premise of foreseeability, the adequacy of the window guarding was not a greatly complicated matter. Comparing Waber's expertise with the complexity of the point at issue, *see* ***Tanner***, 228 Wis. 2d at 370, we conclude that it was error to disqualify Waber after trial.

¶12 We turn to the rulings on motions after verdict, the first being OKK's motion for JNOV. A decision granting a motion for JNOV is reviewed de novo; a question of law is presented by the assertion that the facts found by the jury are not sufficient as a matter of law to constitute a cause of action. ***Management Comp. Serv. v. Hawkins, Ash, Baptie***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). Here, the jury found that OKK was negligent in designing the machine—cause in fact. On Volden's negligence claim, the trial court found proximate cause to be absent, citing three public policy considerations: the injury was too remote from OKK's negligence, the events culminating in the injury were too highly extraordinary, and it was too unreasonable a burden to place on OKK to foresee the injury. *See* ***Peters v. Menard***, 224 Wis. 2d 174, 193-94, 589 N.W.2d 395 (1999) (describing the public policy analysis). Whether public policy considerations will result in nonliability is also a question of law which we review de novo. ***Id.*** at 194.

¶13 The trial court's decision was based on the number of factors producing the accident that were not within OKK's control. The trial court explained that OKK did not control the type of metal and tool used, the location of the work surface, or whether the chips extracted during the process would be in bits or stringy. The trial court looked to testimony that described the accident as an extraordinary convergence of these elements and that it was a random occurrence for the tool to drop to the precise location on the work surface where it

would be caught in the spindle's rotation.[7] What the trial court overlooked was that the machine was operated within parameters set by OKK and that there was evidence that it was foreseeable that objects could fly around inside the machine which could be compelled against the sides of the machine and should be guarded against.[8] That the window failed as a guard was not too remote when the forces compelled against it were foreseeable.[9] The burden to protect against the foreseeable forces is not unreasonable and is within the manufacturer's duty. "[T]he test of foreseeability expects manufacturers to 'anticipate the environment which is normal for the use of his product.' Consequently, the duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers, and to act accordingly." ***Morden v. Continental AG***, 2000 WI 51, ¶47, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). We conclude that it was error to excuse OKK from liability as a matter of law.

¶14 The trial court's rationale for conditionally granting JNOV on the strict liability claim is not clear. By reference to ***Glassey v. Continental Insurance Co.***, 176 Wis. 2d 587, 500 N.W.2d 295 (1993), it appears to have equated the buildup of chips around the spindle as creating a substantial and material change to the product. ***Glassey*** holds that to maintain a strict products liability claim, the plaintiff must show that the product has not undergone a

[7] OKK retained expert Rodney Schaeffer, but did not call him to testify at trial. Portions of Schaeffer's deposition were read to the jury. Believing that Toolcraft had raised the work surface above the work envelope set by OKK, Schaeffer indicated that it was not foreseeable that the tool would drop to the work surface. He called it a random event.

[8] Schaeffer acknowledged that the possibility of something being expelled through the window existed and should be tested against.

[9] Schaeffer indicated that impact measurements could be made under the worst case conditions.

substantial and material change from the time it left the manufacturer or seller. ***Id.*** at 600. While there was a suggestion that the buildup of chips around the spindle was unusual, it remains true that Toolcraft was utilizing a type of steel that OKK could have anticipated and was operating the machine, including the cleaning away of chips, according to OKK's parameters. There was no evidence that any change had been made to the window. In the absence of a change to the machine itself, Volden's claim for strict liability is viable. It was error to grant JNOV on the strict liability claim.

¶15 A motion to change the jury's answers challenges the sufficiency of the evidence to sustain the answers given. WIS. STAT. § 805.14(5)(c). In reviewing an order changing a jury's answer, we begin with considerable respect for the trial court's better ability to assess the evidence. ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). However, we may overturn a trial court's decision to change one or more answers on a verdict if the record reveals that the trial court was clearly wrong. ***Id.*** at 671-72.

¶16 In considering a motion to change the jury's answers, the trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. ***Id.*** at 671. If there is any credible evidence to support the jury's findings, a trial court is not justified in changing the jury's answers. ***Id.*** The trial court must defer to the jury's assessment of the credibility of witnesses and the weight to be given their testimony, and must accept the reasonable inferences drawn by the jury. ***Id.*** On appeal, we are guided by these same rules. ***Id.***

¶17 Volden was required to prove that OKK's design was foreseeably hazardous to someone (negligence) or that the machine was in a defective

condition when sold by OKK and that it was unreasonably dangerous as sold (strict liability). ***Shawver v. Roberts Corp.***, 90 Wis. 2d 672, 682, 687, 280 N.W.2d 226 (1979). Our opinion has already recounted evidence sufficient to sustain the jury's verdict. This is particularly true in light of our determination that Waber's testimony was properly before the jury and should not have been discounted by the trial court. The jury was free to accept Waber's testimony that it was foreseeable that objects could fly about in the machine and be compelled against the sides of the machine anywhere within the 360° rotation. Other testimony confirmed this possibility. The window proved to be an inadequate guard when confronted with foreseeable forces.[10] This, coupled with evidence that the window served no utility and that permitting the milling operation at the window level exposed the operator to unnecessary danger, permits a reasonable inference that OKK was negligent in the design and had delivered the machine in an unreasonably dangerous condition. It is an inference that reviewing courts are bound to accept. The trial court was clearly wrong in changing the jury's answers and the verdict must be reinstated.

¶18 OKK argues that the negligence of Toolcraft was not only a superseding cause but was, as a matter of law, greater than its own. OKK convinced the trial court and the court granted a new trial in the interests of justice. The court found that a miscarriage of justice had occurred with respect to the

[10] The trial court commented that Waber's testimony "was really res ipsa type of argument that obviously the shield was defective because the tool was expelled through the shield." Waber's testimony was a permissible opinion on the ultimate fact. *See* ***Rabata v. Dohner***, 45 Wis. 2d 111, 124, 172 N.W.2d 409 (1969) (there is no objection in Wisconsin to an expert giving his or her opinion on an ultimate fact); WIS. STAT. § 907.04 ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). It was left to the jury, based on its assessment of credibility and weight, to determine whether the window design was faulty. *See* ***Galarza v. State***, 66 Wis. 2d 611, 618, 225 N.W.2d 450 (1975).

jury's apportionment of negligence. A new trial may be granted in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). Such a motion is within the discretion of the trial court and will not be reversed on appeal unless the trial court clearly exercised its discretion erroneously. ***Id.*** Our role is not to seek to sustain the jury's verdict, but to look for reasons to sustain the trial court. ***Id.***

> No abuse of the trial court's discretion will be found if the trial court sets forth a reasonable basis for its determination that one or more material answers in the verdict are against the great weight and clear preponderance of the evidence. There is an abuse of discretion if the trial court grounds its decision upon a mistaken view of the evidence or an erroneous view of the law.

Krolikowski v. Chicago & N.W. Transp. Co., 89 Wis. 2d 573, 581, 278 N.W.2d 865 (1979) (citations omitted).

¶19 Once again, the trial court focused on the evidence suggesting that Toolcraft had misused the machine by employing steel and tools that permitted maximum speed and tremendous chip buildup. While these factors may have led to the tool being dropped, it was not Toolcraft's usage that caused the window to fail as an adequate guard in the event that the tool would be compelled against it, a foreseeable event. The trial court's assessment of causal responsibility was painted with too broad a brush. The trial court's ruling was based on a mistaken view of the evidence and granting a new trial was an erroneous exercise of discretion.

¶20 We need not address the trial court's decision to grant a new trial on negligence. That ruling comes into play only in the event that we affirm the

dismissal of the strict liability claim and reverse as to dismissal of the negligence claim. We reverse the dismissal of both claims, the changes to the jury's answers, and the granting of a new trial. As a result, the jury's verdict is reinstated and judgment should be entered accordingly.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.

¶21 BROWN, P.J. *(dissenting).* I believe that we need only address the trial court's decision to change the jury's answers as the dispositive issue. *See* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 47, 526 N.W.2d 264 (Ct. App. 1994) (if a decision on one point disposes of the appeal, the appellate court need not decide other issues raised). A motion to change the jury's answers challenges the sufficiency of the evidence to sustain the answers given. WIS. STAT. § 805.14(5)(c). In reviewing an order changing a jury's answer, we begin with considerable respect for the trial court's better ability to assess the evidence. ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996). However, we may overturn a trial court's decision to change one or more answers on a verdict if the record reveals that the trial court was clearly wrong. ***Id.*** at 671-72.

¶22 In considering a motion to change the jury's answers, the trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. ***Id.*** at 671. If there is any credible evidence to support the jury's findings, a trial court is not justified in changing the jury's answers. ***Id.*** The trial court must defer to the jury's assessment of the credibility of witnesses and the weight to be given their testimony, and must accept the reasonable inferences drawn by the jury. ***Id.*** On appeal, we are guided by these same rules. ***Id.***

¶23 At first blush, it appears that the trial court violated the guiding principle that the weight and credibility of the witnesses are decided exclusively

by the jury by discounting Waber's qualifications to give opinion testimony. A closer examination reveals that in changing the jury answers, the trial court did not flatly hold that Waber was not qualified to give any opinions. Rather, the court recognized that the opinions given by Waber were not sufficient to establish liability in either negligence or strict liability. The court commented, "I am satisfied that his testimony *as far as it went* was supported by his qualifications …. And having said that, however, it is clear in my review of my notes on Mr. Waber's testimony, it was really res ipsa type of argument that obviously the shield was defective because the tool was expelled through the shield."[11] (Emphasis added.) The court went on to conclude that the record was devoid of information on designs of windows or applicable regulations or standards.

¶24 Volden was required to prove that OKK's design was foreseeably hazardous to someone (negligence) or that the machine was in a defective condition when sold by OKK and that it was unreasonably dangerous as sold (strict liability). ***Shawver v. Roberts Corp.***, 90 Wis. 2d 672, 682, 687, 280 N.W.2d 226 (1979). Volden's focus was on the window. There was testimony that the window served no utility and that permitting the milling operation at the window level exposed the operator to unnecessary danger. However, there was no testimony that having a window or setting the work surface aligned with the window was defective design or negligence. Volden focused solely on the inadequacy of the window material. Waber's opinion was that the window material was insufficient because it broke. As the trial court observed, this is nothing more than reliance on the res ipsa loquitur doctrine.[12] Waber did no

[11] The window was interchangeably referred to as a shield or guard.

[12] ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 598 n.2, 492 N.W.2d 167 (Ct. App. 1992), explains:

(continued)

scientific testing to determine the strength of the material used in the window. Although there was testimony that it was foreseeable that the tool could drop or that objects could become dislodged within the interior of the machine and thrown against the sides, Waber did no calculation of the probable forces that would operate in the machine or the standard window strength needed under the foreseeable circumstances.[13] Waber's suggestion that the window lacked sufficient guarding to prevent "anything that could have come out of this" lacked foundation. The jury had no way of determining whether OKK had utilized window material that was adequate under foreseeable circumstances or if OKK had failed in that regard.[14] The jury could only speculate that the window material

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> "Res ipsa Loquitur" is a latin phrase which means, "the thing speaks for itself." It is the offspring of a casual word of Baron Pollock during argument with counsel in an 1863 English case, ***Byrne v. Boadle***, 2 H.&C. 722, 728, 159 Eng.Rep.R. 299 (1863), in which a barrel of flour rolled out of a warehouse window and fell upon a passing pedestrian. In its inception the principle was nothing more than a reasonable conclusion, from the circumstances of an unusual accident, that it was probably the defendant's fault.

One of the two elements necessary for the application of the doctrine in Wisconsin is the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence. ***Lee v. Milwaukee Gas Light Co.***, 20 Wis. 2d 333, 339, 122 N.W.2d 374 (1963). There is no claim that the doctrine applies in this case.

[13] Excerpts read at trial of the deposition testimony of Rodney Schaeffer, an expert retained by OKK but not called to testify at trial, indicated that impact measurements could be made under the worst case conditions. Schaeffer did not provide the analysis. Volden takes a gigantic leap when he represents in his reply brief that Schaeffer indicated that "operating the PCV40 at the level of the guard [window] would cause the machine to fail ***any*** safety analysis." That was not Schaeffer's testimony. Schaeffer merely acknowledged that the possibility of something being expelled through the window existed and should be tested against. Schaeffer had no knowledge of what testing was done on the material used.

[14] "[T]he test of foreseeability expects manufacturers to 'anticipate the environment which is normal for the use of his product.' Consequently, the duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers, and to act accordingly." ***Morden v. Continental AG***, 2000 WI 51, ¶47, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted).

utilized did not meet minimum standards and therefore created an unreasonably dangerous machine.

¶25 The comparison found in ***Lee v. Milwaukee Gas Light Co.***, 20 Wis. 2d 333, 122 N.W.2d 374 (1963), is instructive. In ***Lee***, a plate glass window blew out from a building in a strong wind and shattered over the plaintiff, causing glass to injure the plaintiff's eye. ***Id.*** at 337. Trial testimony included opinions that the glass was set wrong and failed to meet safety limits for window settings that should withstand winds up to sixty-five miles per hour. ***Id.*** On the day of the accident, the wind did not exceed twenty-three miles per hour. ***Id.*** The court concluded that the defendant's argument that high winds excused liability was without merit because there was no evidence to justify the conclusion the wind was of such force as to be unforeseeable. ***Id.*** at 339. The court observed that the breakage could not be explained by winds exceeding the force which the installation and setting of the window were capable of withstanding according to the customary standards for that size window. ***Id.*** at 340. Based on the evidence, the doctrine of res ipsa loquitur was applied. ***Id.***

¶26 In contrast, here, the jury was not provided with the necessary information about the foreseeable forces that could be applied against the window, the forces the window could withstand, and the force applied when the tool was expelled.[15] There was no evidence linking these measurable factors so as to permit the bald assertion that the window material was inadequate because it broke.

[15] Waber testified that it was foreseeable that the tool would drop and the spindle would descend without a tool. He did not, however, indicate the foreseeability of the tool coming to rest in the precise location where it would be caught up on the spindle's rotating action. Indeed, his description of the accident indicated that after the tool dropped "everything was stacking up just right." Schaeffer indicated it was not foreseeable that the tool would drop to the work surface. He called it a random event.

Likewise, it is not enough to suggest that the window material could have been made a little thicker if it has not been established in the first place that the window was inadequate to withstand anticipated forces. "It is not the possibility but the probability of harm in terms of foreseeability upon which the liability for negligence rests." ***Id.*** at 339. Waber's testimony fell short of providing a sufficient foundation for an evaluation of the probability of harm because it did not explain or measure the foreseeable forces and those generated in this accident.[16] The trial court was not clearly wrong in changing the verdict answers.

[16] The type of evidence missing does not, as Volden suggests, give him the burden to either "re-design" the machine by proof of safeguarding alternatives or "defend" the machine by demonstration of OKK's testing. "Evidence of 'the custom in the industry (what the industry was doing) and the state of the art (what the industry feasibly could have done) at the time' of the design or manufacture is relevant to the jury's determination of negligence." ***Morden***, 2000 WI 51 at ¶56 (citation omitted).